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IN THE

# Supreme Court of the United States

October Term, 1962

No. 280

JOSEPH VOGELSANG and GEORGE SCHMITS, co-partners doing business under the firm name and style of WHITEHOUSE BROS.,

*Petitioners,*

*against*

DELTA AIR LINES, INC.,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SIMON GREENHILL,
JOHN M. SPEYER,
*Counsel for Petitioners,*
17 John Street,
New York 38, New York.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Petitioners, Joseph Vogelsang and George Schmits, co-partners doing business under the firm name and style of Whitehouse Bros., respectfully pray that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Second Circuit, entered on April 30, 1962, affirming the judgment of the District Court of the United States, Southern District of New York, in the appeal docketed in the said Court of Appeals as No. 27108.

### Opinions of the Courts Below

The opinion of the District Court for the Southern District of New York is reported at 193 F. Supp. 613 (Appellants-Appellees' Appendix in Appeal No. 27108, pp. 83a-85a). The opinion of the Court of Appeals for the Second Circuit is recorded in 302 F. 2d 709 (*infra*, pp. 21-29).

## Jurisdiction

The judgment of the Court of Appeals was entered on April 30, 1962 (*infra*, p. 30). The jurisdiction of this court is invoked under 28 U. S. C. Sec. 1254(1).

## Questions Presented

1. Whether, in the circumstances outlined herein, and as a matter of public policy and morality, a carrier had the right to invoke the benefits of its tariff limiting liability for baggage lost as the immediate and proximate result of the carrier's own wanton or wilful misconduct?

2. Whether the Courts and not the Civil Aeronautics Board are the proper forums for determining the applicability or legality of a tariff rule limiting liability for loss where the carrier is guilty of wanton or wilful misconduct?

## Statement of the Case

Petitioners, co-partners in the manufacture of jewelry, brought this action against respondent, a common carrier by air (hereinafter referred to as Delta), for loss of baggage, containing assorted jewelry and loose diamonds, caused by the *wanton or wilful misconduct* of Delta's employees in the course of their employment.

Schmits, one of the petitioners, boarded Delta's plane in Cincinnati, Ohio, en route to Jacksonville, Florida, in connection with a selling trip. Prior to boarding he checked two pieces of baggage and received the appropriate claim stubs. Delta transported Schmits and his luggage to Imeson Airport in Jacksonville. Upon arrival Schmits went to the claim area in front of the airport building and tendered both claim stubs. He received only one bag. The other, identified as a jewelry sample case, was, as the answer admits, "lost or stolen while in the possession of

the defendant, without any fault or negligence on its part; and by reason whereof, it was not delivered to said George Schmits" (App. p. 21a).

There was no trial of the action. Delta moved in the District Court for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure. They contended that they owe petitioners nothing because the lost bag contained jewelry which was not "acceptable for transportation" within the purview of tariff rules 65(B)(1) and 70(B) but, if they were liable, they owe $100 by reason of tariff rule 71(A) entitled "Limitation of Liability" which, by its terms, limited Delta's liability for the loss of baggage (App. Ex. A, opp. p. 10a).

In the moving papers Delta offered no explanation of the special circumstances surrounding the loss of Schmits' bag which *on its face* raised the grave issue of wanton or wilful misconduct. They contended that regardless of the testimony of their employees in their depositions, the handling of Schmits' bag amounted to a "misdelivery", and argued that "even if it be assumed that there was an unauthorized delivery of the bag and its contents" the motion for summary judgment should be granted *as a matter of law* (App. pp. 7a-8a).

In opposition, petitioners showed that the plane carrying Schmits and his baggage arrived nineteen minutes late at Imeson Airport, Jacksonville, and that immediately the ground personnel or crew, consisting, among others, of ramp agent, Wiley and the porter, Phillips, entered the flying field with baggage carts and commenced unloading. While unloading was in progress, an unidentified man came on to the flying field, went under the plane and accosted agent Wiley. Wiley testified in his deposition that the stranger, holding a claim check in his hand, said that he was looking for his luggage; that he took the claim check and without even looking at it, turned around and handed it to Phillips who accepted it; that he never spoke to the stranger

nor did he see Phillips talk to him; and that he saw the stranger take a bag off the baggage cart but did not stop him and, as far as he knew, neither did Phillips.

Phillips testified in his deposition that the stranger gave him the claim check saying, "Porter, will you get my bags for me?"; also, "I got a quick connection to make. Will you get *this* bag for me?"; that he returned the check to the stranger telling him that he had 63 bags to remove from the plane in a few minutes and the bags would be carried around to the self-service area in front of the terminal where he could "select your own bag". Phillips reported to his superiors that he also said to the stranger, "*However, if you see your bag, it is all right to take it*" (App. p. 47a). * The thief promptly selected Schmits' bag and disappeared.

At the time of the loss it was a cardinal rule at Imesón Airport that *baggage is not delivered at planeside.* Such a rule was agreed to by the managers of all the airlines using the airport and the rule was posted on the bulletin board in Delta's baggage room. The rule was in accordance with the accepted practice and custom in all airports in this country that no person may enter the public cargo ramp and apron area of an air terminal without permission except, of course, authorized airport representatives.

The rule was incorporated in Delta's Standard Practice Operation Manuel under the caption: Ramp and Office Safety, to wit:

> "Protection of Passengers and Visitors (p. 2):
>
> * * *
>
> "J. Do not allow passengers to walk under any part of the airplane or in close proximity of propellers or fuel trucks". (App. p. 29a).
>
> * * *
>
> "B. PROTECTING CARGO (p. 7):
> Cargo should be protected at all times from damage by weather, equipment, and pilferage. The following rules should be observed.
>
> * * *

---

* This report was produced from Delta's own files at the time the depositions were taken (App. p. 43a).

> 2. Allow only authorized personnel in cargo handling and storage area. All unauthorized persons found there should be challenged" (App. p. 29a).

Wiley specifically admitted personal knowledge of the rules and safety regulations forbidding delivery of baggage at planeside. Phillips demonstrated his personal knowledge when he directed the stranger to the baggage claim area in front of the terminal building. Nonetheless, Wiley admitted prior violations of the rule when he testified that the rule is broken "*quite often*" in instances where "someone wanting to get his bag, claims he has a fast connection" to make (App. p. 78a).

With respect to claim checks, the contract condition on the reverse side of the passenger ticket further provided:

> "* * * (5) Baggage carried hereunder will be delivered to the bearer hereof upon return to carrier of the baggage (claim) tag(s) * * *" (App. Ex. C., opp. p. 14a).

This condition is further implemented by the safety regulation in the manual entitled "Claim Checks".

> "Claim checks will be obtained for all baggage delivered to deplaning passengers. Passengers often point out a bag which they believe is theirs, but later proves otherwise. Each claim check must be *paired* with the number on the baggage strap check." (App. pp. 30a-31a) (Italics as in original).

In the District Court, Sugarman, D. J., held that Delta could not obtain complete exoneration from liability under the tariff rules because where the "primary purpose of Schmits' trip was to sell his wares" it was "certainly 'necessary' and 'appropriate' for his 'convenience' to have his sample case carried as baggage for the 'purpose of his trip' within the meaning of the tariff". As to the alternate branch of the motion dealing with limitation, the court held that Delta's claim of $100 "is sound" and "the tariff provisions are to be given effect to the extent that they are

applicable to plaintiffs' claim" upon the authority of *Lichten* v. *Eastern Airlines*, 189 F. 2d 939 (C. A. 2) (App. pp. 84a-85a).

Cross-appeals were taken by the parties (App. pp. 88a-90a). Upon argument Delta withdrew its appeal from that part of the judgment which denied complete exoneration (*infra*, p. 22). On this phase of the case, therefore, the District Court's opinion became the law of the case. Thus, in the posture in which the appeal came to the Court of Appeals, Schmits' had every right under the tariff to check his jewelry as baggage and Delta could not have refused to carry it within the meaning of the tariff, but whether the District Court was right in upholding the tariff limitation as a matter of law was the issue presented.

The Court of Appeals affirmed the judgment below on the opinion of Friendly, C. J. (*infra*, pp. 21-29). The court cautiously avoided the precise issue posed by the petitioners in this case and, for that matter, never once used or referred to the words, *wanton or wilful misconduct*. Instead, the affirmance was predicated on the theory that Schmits' bag was misdelivered and, by law, limitations have always been upheld in misdelivery cases and, secondly, the reasonableness of Rule 71(A) should have been submitted to the Civil Aeronautics Board in the first instance for review, despite the fact that petitioners at no time questioned the reasonableness of that rule.

## Reasons Relied Upon for Allowance of the Writ

### POINT I

**The Court below erred when it ignored all the uncontroverted acts of wrongful conduct and upheld the limitation as a matter of law upon its prior decision in *Lichten* v. *Eastern Airlines*, 189 F. 2d 939. Petitioner, who had a right under the tariff to check his case of jewelry as baggage was thereby penalized for Delta's intentional, wanton and wilful misconduct which caused the loss. Neither public policy nor morality can support such a holding which has as its basis the right to use a tariff as a shield in the face of one's own wrongful acts.**

This case involves an important question of federal law, of direct interest to every air traveler in this country, which has never been, but should be, settled by this court.

It is common knowledge that, for valid safety reasons, the traveler boarding a plane has no choice but to surrender complete control and dominion of his baggage to the care and custody of the airline company. In the instant case the baggage checked by petitioner contained jewelry, which was fully permissible and acceptable under the tariff. Accepting this baggage with its attendant responsibilities, the carrier, Delta in this case, provides in its passenger ticket that baggage will be returned to the bearer of the baggage tag and that carriage is subject to rules and regulations of the airline (App. p. 28a). Delta's previously promulgated safety rules and regulations provided that no baggage shall be delivered at planeside (App. pp. 38a-39a), that no passenger shall walk under any part of the airplane or in close proximity to the propellers, that all unauthorized persons in cargo handling areas shall be challenged, and that all claim checks must be paired (App. pp. 29a-30a).

Where, with knowledge of the rules, Delta and its employees, acting within the scope of their employment, have deliberately violated these rules and in addition, as here, have been guilty of wanton or wilful misconduct which was the immediate and proximate cause of the loss suffered by the passenger, Schmits, then, as a matter of public policy and good conscience, Delta should not be permitted to use the tariff as a shield in order to limit its liability. Such a result would be manifestly unfair and contrary to the fundamental rule of law that no one may avail himself of the benefit of his own wrongful acts (*Stearns* v. *United States*, 291 U. S. 54, 61-62).

Limited liability clauses, such as Rule 71(A) (App. Ex. A, opp. p. 10a) which limits liability "for the loss of" baggage, are intended as a reasonable protection to the carrier against *ordinary negligence* in interstate commerce (*Magnin* v. *Dinsmore*, 70 N. Y. 410). The courts have consistently applied the rule to every type of loss resulting from ordinary negligence such as, for example, a failure to deliver (*Georgia F. & A. R. Co,* v. *Blish Milling Co.*, 241 U. S. 190 (misdelivery); *Adams Express Co.* v. *Croninger*, 226 U. S. 491 (nondelivery) as well as ordinary losses in transit (*Southern Exp. Co.* v. *Pastime Amusement Co.*, 299 U. S. 28 (delay in transit); *American Ry. Exp. Co.* v. *Lindenburg*, 260 U. S. 584 (damage in transit)).

The exception to the rule has been made where the carrier is guilty of misfeasance or a wrongful delivery of the property not consistent with or in the course of the performance of its duty as a carrier (*Magnin* v. *Dinsmore, supra*, 70 N. Y. 410; *D'Utassy* v. *Barrett*, 219 N. Y. 420; *Gillespie* v. *Platt*, 19 Misc. 43). In its application, the exception has been applied to a single type of loss, namely, the so-called "true" conversion cases where the carrier itself is the wrongdoer and beneficiary (*Glickfield* v. *Howard Van Lines*, 213 F. 2d 723, 727 (C. A. 9); *Moore* v. *Duncan*, 237 Fed. 780, 782 (C. A. 6); *Dexter & Carpenter* v. *Davis*, 281 Fed. 385, 388 (C. A. 4)).

Thus is reached the pivotal point in this case which is, whether the exception should be applied to a loss occurring by reason of the carrier's wanton or wilful misconduct. No case has been found in which the facts or pleadings raise this precise issue. There would appear to be no valid reason why a lesser degree of accountability should be applied in cases of wanton or wilful misconduct which is as much an intentional tort as "true" conversion.

Wanton or wilful misconduct lies on a different plane than ordinary negligence. It is a reckless disregard of another's rights and denotes intentionally doing that which should not be done, or failing to do that which should be done with knowledge, express or implied, that injury may result (*Evans* v. *Texas Pac.-Missouri Pac. Terminal R. R.*, 134 F. 2d 275 (C. A. 5); *Hazle* v. *Southern Pac. Co.*, 173 Fed. 431 (Cir. D. Or.); Restatement of the Law, Torts, Vol. 2, Sec. 500).

A loss sustained by reason of wanton or wilful misconduct justifies an award of punitive damages "if the defendant has acted wantonly or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations" (*Lake Shore & M. S. Railway Co.* v. *Prentice*, 147 U. S. 101, 107; *Wills* v. *Trans World Airlines, Inc.*, 200 F. Supp. 360, 367 (S. D. Cal. C. D.)) and contributory negligence by the plaintiff is not a defense. (Prosser, Torts, (1941) p. 261; 29 Cyc. 509). It would follow, therefore, that Schmits' failure in this case to declare a higher valuation under the tariff cannot be used to invoke the doctrine of estoppel. The very nature of Delta's misconduct has taken this case out of the regime of unintentional tortious actions. Any other result would condone the wrongful conduct of the carrier and be contrary to public policy.

In the analogous "free pass" cases, this Court has held that a stipulation releasing the carrier from all liability from negligence cannot protect carrier from the conse-

quences of its wilful and wanton negligence (*New York Central R.R. Co.* v. *Mohney*, 252 U. S. 152). The *Mohney* case was cited with approval in *Martin* v. *Greyhound Corp.*; 227 F. 2d 501 (C. A. 6) which involved issuance of a bus pass as provided in 49 U. S. C. A. Sec. 317 (b) and in *Braughton* v. *United Air Lines, Inc.*, 189 F. Supp. 137 (W.D. Mo.) which involved an airline pass as provided in 49 U. S. C. A. Sec. 483(b).

These cases demonstrate that despite the release in the free pass from liability for negligence, it is the policy of the courts that demonstrable wanton or wilful negligence will require the carrier to assume its full liability. It will be noted that in the case at bar the tariff does not even contain specific language limiting liability in the event of "negligence." The tariff limits liability in the event of "loss" without defining the term.

Is the term "loss" so broad in scope as to include every degree of negligence? Obviously not, when we consider that loss does not encompass a "true" conversion. So, too, where the carrier has been guilty of wanton or wilful misconduct the property cannot be said to be *lost* in the sense in which the term is used in the tariff, if, indeed, it can be considered lost in any sense. The tariff and passenger ticket were drawn by the defendant and the law requires that the passenger thus be permitted the most favorable interpretation thereof. If it was Delta's intention to limit liability even in the event of its own wanton or wilful misconduct, the tariff should have so provided. In accordance with the applicable law, the term *"loss"* must be defined to mean loss by ordinary negligence, *not* loss by wanton or wilful misconduct.

It is respectfully submitted that as a deterrent to the carrier's affirmative acts of intentional wrongdoing, the law must step between the parties and impose full liability upon the carrier. This is both wise and desirable and recom-

mends itself to the best interests of the general public. Such a principle was recognized and incorporated in Article 25 of the Warsaw Convention (49 Stat. 3000), to wit:

> "(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct."

While the Warsaw Convention does not apply to domestic flights, as in the case at bar, it is pertinent to note that the term "wilful misconduct" was not defined in the articles of the convention and that the courts in this country have applied the term very much in the same sense as it is used in other contexts. In one of the clearest definitions of "wilful misconduct", and having particular application to the case at bar, the Court in *American Airlines, Inc.* v. *Ulen*, 186 F. 2d 529 (D. C. Cir.) quoted the Trial Court's charge to the jury (p. 533):

> "Now wilful misconduct is not, as I have said, merely misconduct but wilful misconduct. So if the carrier, or its employees or agents, wilfully performed any act with the knowledge that the performance of that act was likely to result in injury to a passenger, or performed that act with reckless and wanton disregard of its probably consequences, then that would constitute wilful misconduct; and if the result of that wilful misconduct was injury to Mrs. Ulen, then her recovery would not be limited by this sum of some eight thousand dollars.
>
> * * *
>
> "Now, the mere violation of those (*safety rules and regulations*), * * * even if intentional, would not necessarily constitute wilful misconduct, but if the violation was intentional with knowledge that the violation was likely to cause injury to a passenger, then that would be wilful misconduct, and likewise, if it was done with a wanton and reckless disregard of the consequences." (italics ours)

In the case at bar, there were the intentional violations of safety rules in delivering baggage at planeside with the knowledge that such violation might cause injury or loss to a passenger; reckless and wanton failure to pair the checks; failure to exchange the proper check for petitioners' bag; deliberate failure to challenge the stranger's appearance on the flying field and permitting him to enter forbidden territory. All these were defaults or conscious omissions of the performance of positive duties relating directly to the safety of petitioners' bag. Coupled with this was the incredible act of encouraging, aiding and abetting the stranger engaged in stealing petitioners' bag. There is, and can be, no claim that this was either innocent, or even mere negligent conduct. These were manifestly intentional and wilful acts done with a wanton and reckless disregard of their probable consequences and involving a high degree of probability that substantial harm would result to petitioners (Restatement, *supra*): The fact that Wiley conceded prior violations of the rule prohibiting delivery of baggage at planeside (App. pp. 78a-79a) clearly evidences a conscious knowledge that the rule was being violated. Just as there is, and can be, nothing in the tariff which prevents the exception applied in the "true" conversion cases, so there is nothing which prevents its application in those instances which the Warsaw Convention terms "wilful misconduct."

Furthermore these affirmative and intentional acts of wrongdoing constituted a violent departure from the contract of carriage, thereby causing a breach so substantial as to go to its essence and amounting to a rescission. It is elementary that a party to a contract cannot repudiate burdensome covenants therein and at the same time enforce beneficial ones. (*Lynch* v. *N. Y. Cent. & H. S. R. Co.*, 89 Misc. 472, affirmed 172 App. Div. 934). This principle has been consistently applied in admiralty (*The Sarnia*, 278 Fed. 459 (C. A. 2) certiorari denied 42 Ct. 382 (improper

stowage of goods)) and common carriage (*Lynch* v. *N. Y. Cent. & H. R. R. Co., supra*, 89 Misc. 476 (failure to ice cargo as required); *McKahan* v. *Amer. Exp. Co.*, 209 Mass. 270 (failure to maintain attendant with cargo and to deliver with a stated period); *Ward* v. *Gulf, M. & N. R. Co.*, 23 Tenn. App. 523 (carriage in type of vehicle not contemplated by the contract)).

In each of the above cases the courts held that the breach of an essential contractual or tariff rule had occurred and that the shippers were thus privileged to consider the contract at an end. Accordingly, any limitation of liability or other defense beneficial to the carrier in the original contract of transportation was completely abrogated.

Despite the term "deviation" which has sometimes been applied in this area, it is clear that the doctrine merely reflects the basic principle of contract law that a breach going to the essence permits of a rescission. Although the term was originally employed as its lexicographical definition implies it has been extended to comprehend all manner of substantial contractual breach. (*The Indrapura* (D. C.) 171 Fed. 929.)

In fact the case at bar presents two compelling factors not usually present in the "deviation" cases. In none of the cases cited above does it appear that the carrier's employees *knowingly* breached the contract, while the instant case bristles with intentional and wilful actions. Despite the accidental or unintentional nature of the breach in those cases it was sufficient to deprive the carrier of its protective contractual provisions. Furthermore, the breach of contract here committed was the *immediate* and *direct* cause of petitioner's loss, and not merely an event which placed the goods in a situation where they were subsequently destroyed by an Act of God, or by third persons, without the carrier's fault or neglect. The loss here was simultaneous in time and place with the breach.

The Court of Appeals sought comfort on this phase of the case in the dissenting opinion of Frank, C. J., in the *Lichten* case by pointing out that the possible validity of a reasonable limitation of liability was conceded, and that no suggestion was made concerning its inapplicability if the carrier's misconduct was extreme (*infra*, p. 28). However, Judge Frank's position on this point was made perfectly clear in the conclusion of his opinion where he stated (p. 950, 189 F. 2d):

> "But I incline to believe that this valuation provision (as my colleagues apparently recognize) did not here apply since defendant's tariff provided that it was not liable in any amount for loss to plaintiff's jewelry. However that may be, *this provision did not, I think, survive the deviation.*" (italics added)

Recent airline cases have recognized that this contractual principle would be applicable in a proper setting (*Braughton* v. *United Airlines, Inc., supra*, 189 F. Supp. 137; *Franklin* v. *United Airlines, Inc.*, 184 F. Supp. 814 (S. D. N. Y.)). In the Franklin case, *supra*, the court phrased it thus:

> " • • • *Where there has been no wilful wrongdoing* by or unjust enrichment of the defendant carrier, plaintiff cannot avoid the contractual limitation of defendant's liability • • •." (italics added)

The Court of Appeals seems to have avoided the precise issue raised in this case by adopting the theory that the loss happened by reason of a "misdelivery", thereby grouping this case with those dealing with ordinary negligence; this, despite the fact that there is no evidence in the record to support such a theory. In fact such a theory is in direct conflict with all the evidence in the case. The record shows that we deal in this case with much more than a misdelivery, as the term is popularly known; there are presented a series of circumstances spelling out intentional and reckless conduct, wilfully and wantonly performed with the knowledge that harm might result—or so

a jury could well find. To characterize such acts, which would ordinarily shock the public conscience, as a misdelivery and, therefore, a "loss" within the meaning of the tariff, is to open the door to the grossest frauds and to perform a great disservice to the general public.

Consistent with its theory of misdelivery, the statement of facts in the opinion below omitted the conversation between the stranger and Phillips wherein Phillips admittedly said, "*However, if you see your bag it is alright to take it*" (App. p. 47a). This after having given the proferred claim check "right back to him". (App. p. 71a).

What did Phillips intend by this statement? It requires no great stretch of the imagination to visualize what *can* happen under such circumstances and what *did* happen in this case. Phillips wilfully exposed petitioners' property to a greater risk than provided for in the contract of carriage and thus knowingly and deliberately caused the loss, while his superior, Wiley, stood by mutely. This, we submit, satisfied the requirements of the intentional tort, known as wanton or wilful misconduct, as defined in 29 Cyc. 510:

> "In order that one may be held guilty of wilful or wanton conduct, it must be shown that he was conscious of his conduct, and conscious, from his knowledge of existing conditions, that the injury would likely or probably result from his conduct, and that with reckless indifference to consequences he consciously and intentionally did some wrongful act or committed some known duty which produced the injurious result."

The wrongful nature of Delta's conduct is further demonstrated by the prior violations of the safety rules which Wiley testified "happens quite often and has happened quite often, close connection for one thing" (App. p. 78a). Despite the Court of Appeals characterization thereof as occasional breaches (*infra*, pp. 24-25) such a

history has been held a significant factor in determining issues of wilful misconduct. In *American Airlines, Inc., v. Ulen, supra*, 186 F. 2d 529, the same Second Circuit noted that there was knowledge that the violations would be likely to cause injury since "the same pilot had flown this same route in the same manner several times before" and concluded:

> "This is only evidence of deliberateness and full knowledge which renders appellant's actions the more reprehensible." (p. 534)

A single violation of rules especially designed for the safety and protection of life and property is evidence of negligence. Repeated violations, for whatever reason, can only stem from a callous indifference to human life and property and are intolerable. Both Wiley and Phillips were acquainted with the safety rules and should have governed themselves accordingly. It is here that the wanton and wilful misconduct is in plain view, justifying petitioners' position that Delta cannot invoke its claimed limitation.

The Court of Appeals based its decision upon its earlier holding in *Lichten* v. *Eastern Airlines*, 189 F. 2d 939 which contained a forceful dissent by Frank, C. J. The case stands primarily for the proposition that, despite the absence in the Civil Aeronautics Act of 1938 (49 U. S. C. A., Sec. 401, *et seq.*) of provisions comparable to the Carmack Amendment (49 U. S. C. A., Sec. 20(11)), an airline, like a railroad, may publish and file a tariff as if Congress had expressly given it the right to do so and that the passenger and airline are bound by the tariff. This right to file binding tariffs, does not mean, as the Court below held, that the tariff is applicable *irrespective of wrongful conduct.*

Whether *Lichten* is sound law or not, it differs essentially from the case at bar in that there the Second Circuit did not consider the question of limitation because of the

operation of the exculpatory clause which provided that jewelry was carried "only at the risk of the passenger". Here, liability is *conceded* and the issue is the extent thereof. Also important is the fact that there was no evidence in *Lichten* that the loss was the result of wanton or wilful misconduct. It was decided on an agreed stipulation of facts which contained no hint that what the Court labelled a "misdelivery" was caused other than by ordinary negligence. On the other hand, the case at bar is based upon violations of safety rules and regulations and sworn depositions reciting, among other things, prior violations and an invitation to a thief to steal Schmits' bag.

Finally, the exercise of dominion over Schmits' bag in this wanton and wilful manner has deprived him of his property as surely as if it had been actually converted by Delta itself. If such a taking is intended by the terms of its tariff, then the tariff permits a deprivation of property without due process of law, and cannot be permitted to stand. Neither the Constitution nor the enabling legislation authorizes a regulation which permits such a taking without compensation.

It is respectfully submitted that there is here presented a proper occasion for the exercise of the supervisory power of this Court.

## POINT II

**The Court below erred when it held that the Civil Aeronautics Board had primary jurisdiction in a case such as this since, in the light of Delta's wrongful conduct, the real issue was the applicability or legality of the rule, which only the Courts may determine.**

Delta, in moving for summary judgment, sought a judicial determination *on the merits* so that the jurisdiction of the court, and not the Board, was conceded. Jurisdiction was accepted by the District Court in its decision.

In fact petitioners in the Court below asserted that they questioned not the reasonableness of Rule 71 (A), but Delta's right to invoke it.

The issue of primary jurisdiction was introduced in this case for the first time by the Court of Appeals which held that "the true thrust" of petitioners' argument was that Rule 71 (A) was "unreasonable" (*infra*, p. 28) despite the fact that, as the court intimated, resort to the Civil Aeronautics Board would be futile (*infra*, pp. 28-29).

Actually, we respectfully submit, "the true thrust" of petitioners' argument is, firstly, that Rule 71 (A) should not be interpreted to permit a limitation of liability in the event of a loss caused by the carrier's wanton or wilful misconduct. It has been held that where the rule itself is not being questioned but the applicability of the rule is at issue, the administrative body does not have primary jurisdiction (*Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285; *Penn. R. R. Co.* v. *Puritan Coal Mining Co.*, 237 U. S. 121).

Rule 71 (A) provides for liability for "loss". The words are used in their plain, ordinary sense. Their construction involves no technical considerations calling for administrative discretion or specialized administrative knowledge. It presents a question of law no different in character from the construction of any other document in dispute (*Great Northern Ry. Co.* v. *Merchants Elevator Co.*, *supra*, p. 291 259 U. S.).

Secondly, by reason of the special circumstances in this case, we are dealing with a breach of the contract of carriage going to its essence, thereby rescinding the contract and vitiating the limitation provision. Clearly, the courts are peculiarly and exclusively qualified to make such a determination.

Thirdly, if the Board intended to authorize Delta to limit its liability irrespective of any wrongful conduct

then the question to be determined is the power of the Board to do so. Again, the courts, and not the Board, are the proper forums for such a determination (*Boston and Maine Railroad* v. *Piper*, 246 U. S. 439).

Thus, it will be seen that whatever view is taken of the issues, their resolution is a judicial and not an administrative function. To demand a prior Board determination under these circumstances is to require the sort of nugatory act with which courts dispense in all sorts of situations. Upon this ground alone, certiorari should be granted and the judgment below reversed.

## Conclusion

The issues involved herein are of national importance. They affect all those using airlines in this country for business or pleasure. The decision of the Court of Appeals, following the *Lichten* case, means that the established public policy in these cases will permit a carrier, under the guise of "misdelivery", to claim the benefit of a tariff limitation where its wanton or wilful misconduct resulted in loss to the passenger's property, and, furthermore, would foreclose court consideration of the applicability of the tariff rule under the guise of "reasonableness". To permit the matter to remain in its present posture is to condone the wrongful acts of the carrier and to put the general public at the complete mercy of the carriers' every act and omission. It is for the Supreme Court to draw that line beyond which the carrier may not stray without assuming full responsibility for its conduct. For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

SIMON GREENHILL,
JOHN M. SPEYER,
*Counsel for Petitioners.*

# APPENDIX

## (Opinion of the United States Court of Appeals for the Second Circuit)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 310—September Term, 1961.

(Argued April 4, 1962 Decided April 30, 1962.)

Docket No. 27108

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JOSEPH VOGELSANG and GEORGE SCHMITS, co-partners doing business under the firm name and style of WHITEHOUSE BROS.,

*Plaintiffs-Appellants,*

—v.—

DELTA AIR LINES, INC.,

*Defendant-Appellee.*

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Before:

CLARK, HINCKS and FRIENDLY,

*Circuit Judges.*

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Plaintiffs appeal from a judgment of the District Court for the Southern District of New York, Sidney Sugarman, *Judge,* 193 F. Supp. 613, limiting their recovery from an airline for misdelivered baggage to $100. Affirmed.

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SIMON GREENHILL (Greenhill & Speyer, John M. Speyer of Counsel), New York, New York, *for Plaintiffs-Appellants.*

JOHN L. CONNERS (Bigham, Englar, Jones & Houston, John M. Aherne of Counsel), New York, New York, *for Defendant-Appellee.*

*Opinion of the United States Court of Appeals for the Second Circuit*

FRIENDLY, *Circuit Judge*:

Plaintiffs appeal from a judgment of Judge Sugarman in the Southern District of New York, 193 F. Supp. 613, which granted a motion of defendant, Delta Air Lines, Inc., for summary judgment limiting to $100 its liability for loss of a bag owned by plaintiffs and checked in connection with the air transportation of one of them.[1] We affirm.

The facts, contained in affidavits, Delta's answer to interrogatories, and depositions, are as follows:

Plaintiffs are partners, engaged in the sale of loose diamonds and the manufacture of platinum, gold and diamond jewelry for sale to retailers. In the fall of 1957, plaintiff Schmits made a flight from the firm's headquarters in Cincinnati, Ohio, to Jacksonville, Florida, on a Delta plane whose final destination was Miami. His transportation was under a coupon forming part of a round trip interstate ticket previously purchased. He checked two bags. The airline affixed a numbered "strap check" to each bag and gave Schmits "claim stubs," bearing the same numbers, which formed the lower part of the tags. One of the pieces of luggage was a small leather bag containing personal articles; the other was a fibre bag encased in a canvas cover and allegedly containing assorted jewelry worth $69,275.87, intended for display to customers of Schmits' firm.

[1] The jurisdiction of the District Court was based on diverse citizenship, 28 U. S. C. § 1332.

In the District Court, Delta also claimed complete exemption under Rule 70(B) of its tariff, which disclaimed liability "for the loss of, injury to, or delay in the delivery of personal property which is not acceptable for transportation pursuant to Rule 65 (Acceptance of Baggage)." Rule 65 limited the carrier's acceptance obligation to "such personal property as is necessary or appropriate for the wear, use, comfort, or convenience of the passenger for the purposes of his trip." Judge Sugarman overruled this claim; Delta has withdrawn its appeal from his ruling.

At the time of Schmits' journey, Delta was a participant in Local and Joint Passenger Rules Tariff No. PR-4 governing the transportation of passengers and baggage between points within the United States,[2] filed with the Civil Aeronautics Board. Rule 71 of the tariff provided, insofar as pertinent, as follows:

> "Rule 71—Limitation of Liability
>
> (A) The liability, if any, of all participating carriers for the loss of, damage to, or delay in the delivery of any personal property, including baggage (whether or not such property has been checked or otherwise delivered into the custody of the carrier) shall be limited to an amount equal to the value of such property, which shall not exceed the following amounts for each ticket:
>
> • • •
>
> $100.00 when any other carrier [including Delta] is responsible for the loss, damage or delay • • •;
>
> • • •
>
> unless the passenger, at the time of presenting such property for transportation, when checking in for flight, has declared a higher value and paid an additional transportation charge, at the rate of 10 cents for each $100.00 or fraction thereof, by which such higher declared value exceeds the applicable amount set forth above, in which event carrier's liability shall not exceed such higher declared value."[3]

The ticket issued to Schmits contained, under the heading "Conditions of Contract," a provision under (4) that:

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[2] The tariff also applied between points in the Continental United States and points in Canada, and between points in Canada.

[3] Certain other airlines accepted basic liability of $250.

> "(d) liability of Carrier in respect of baggage and other personal property is limited to its declared value which shall not exceed $100 (U. S. currency) or its equivalent per passenger, unless a higher valuation is declared in advance and additional charges are paid pursuant to Carrier's tariffs;"

and another provision

> "(5.) Baggage carried hereunder will be delivered to the bearer hereof upon return to Carrier of the baggage (claim) tag(s)."

Schmits did not avail himself of the option to declare a higher value than $100 and pay the corresponding charges, which, for the value now claimed, would have considerably exceeded his fare for this leg of the trip.

On arriving at Jacksonville, Schmits went to a self-claim baggage area in the terminal. When the truck with luggage from his flight arrived Schmits saw, and received the leather bag containing personal effects; the canvas-covered bag with the jewelry was not on the truck and has never been located. Investigation revealed that as the plane was being unloaded on the ramp, a man holding a claim check approached the porter who was receiving baggage from the bin in the belly of the plane, and asked for his bag; the porter declined to search for it. The man then made a similar request of another employee, who having finished his task of unloading the mail bin in the tail of the plane, had joined the porter in receiving baggage. The man gave this employee a claim tag; the latter handed the tag to the porter; the man took a bag, presumably Schmits', and departed; no one ever looked at the proffered claim tag. Although Delta's internal rules required surrender of the claim tag and prohibited ramp delivery, both requirements

were occasionally breached when passengers sought quick delivery of baggage to assist in making connections.

Section 403(a) of the Civil Aeronautics Act of 1938, 49 U. S. C. § 483(a), then in effect [now § 403(a) of the Federal Aviation Act of 1958, 49 U.S.C. § 1373(a)], obliged Delta to file with the Civil Aeronautics Board "tariffs showing all rates, fares, and charges for air transportation between points served by it * * * and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation." The Board required, 14 C. F. R. § 221.38(a), that "the rules and regulations of each tariff shall contain" *inter alia*:

> "(4) All other provisions and charges which in any way increase or decrease the amount to be paid on any shipment or by any passenger or by any charterer or which in any way increase or decrease the value of the services rendered to the shipment or passenger or charterer."[4]

A provision limiting liability for baggage unless a higher valuation is declared and higher charges paid is within this requirement. Cf. *Herman* v. *Northwest Airlines, Inc.*, 222 F. 2d 326 (2 Cir.), cert. denied 350 U. S. 843 (1955).

A long line of decisions, too familiar to warrant complete citation, has settled that limitations of liability in railroad tariffs required to be filed with the Interstate Commerce Commission are binding on shippers and passengers, whether the limitation was also embodied in the transportation documents, as in *Adams Express Co.* v. *Croninger*, 226 U. S. 491 (1913), or was not, as in *Boston*

[4] 49 C. F. R. § 221.38(g) provided that "Where it is desirable or found more practicable, the rules and regulations required by this section may be published in separate governing tariffs * * *."

*& Maine R.R.* v. *Hooker*, 233 U. S. 97 (1914). In *Western Union Telegraph Co.* v. *Esteve Brothers & Co.*, 256 U. S. 566 (1921), the principle was extended to tariff provisions of a telegraph company filed with the Commission, although not then required to be. Inevitably, therefore, the same rule has been applied to tariffs of air carriers filed with the Civil Aeronautics Board under 49 U. S. C. § 483(a), *Lichten* v. *Eastern Air Lines, Inc.*, 189 F. 2d 939 (2 Cir. 1951); *Herman* v. *Northwest Airlines, Inc., supra.*

Plaintiffs contend that what happened here did not constitute "the loss of, damage to, or delay in the delivery of any personal property" within Rule 71(A). They say the bag was not lost, damaged or delayed, but misdelivered. We would not read "loss" so narrowly. For all practical purposes a bag is just as much "lost" to the owner when it is delivered to someone else who does not return it, as when it has been misplaced or pilfered. The purpose of Rule 71(A) was to protect the airline directly, and other users of its service indirectly, from large baggage claims of the sort here presented unless the carrier was advised of the need for taking special precautions and adequately paid for their cost and the enlarged responsibility assumed. This forbids a construction, not called for by the words, that would eliminate so common a cause of "loss" as a misdelivery; a true "conversion" by the carrier itself, see *Glickfeld* v. *Howard Van Lines, Inc.*, 213 F. 2d 723, 727 (9 Cir. 1954), would be another matter. The Carmack Amendment, 49 U. S. C. § 20(11), making an initial carrier of property liable "for any loss, damage, or injury to such property" caused by a connecting carrier, has always been held to include misdelivery, *King* v. *Barbarin*, 249 F. 303, 305 (6 Cir. 1917); *Winget* v. *Grand Trunk Western Ry.*, 210 Mich. 100, 177 N. W. 273 (1920); and misdelivery comes within the phrase "failure to make delivery" in a bill of lading requiring timely notice of claim in that event,

*Georgia, Florida & Alabama Ry.* v. *Blish Milling Co.*, 241 U. S. 190 (1916). *Lichten* v. *Eastern Air Lines, supra*, also is directly in point on the facts, although the argument seems not to have been made in exactly the form in which plaintiffs make it here; there too the tariff spoke of "the loss of, or any damage to, or any delay in the delivery of" articles included in baggage and the bag was delivered to an unknown person without production of the claim tag, 189 F. 2d at 940.

Plaintiffs appear to argue in the alternative that if the tariff provision applies to conduct which they regard as so reprehensible as Delta's, it was one that the Civil Aeronautics Board could not lawfully accept. They point, by way of analogy, to Article 25(1) of the Warsaw Convention, 49 Stat. 3000, 3020, relating to certain international air carriage, whereby

> "The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct."

and argue that Delta's conduct was of the sort there described. The Warsaw Convention, however, does not affect the Board's power to accept tariffs providing other regimes of liability for transportation not coming within it. The *Lichten* decision is *a fortiori* authority against plaintiffs on this score. There the tariff completely exempted from liability as regards jewelry; the majority held the Board could lawfully accept such a provision, and even the dissenting judge thought that "possibly" Eastern might have provided for limitation of liability for baggage "to a cer-

tain, reasonable amount, unless the passenger gave notice of the presence of valuables in his baggage and paid an additional sum for its transportation," 189 F. 2d at 945, without suggesting that such a limitation would not be valid if the carrier's misconduct were extreme.

Indeed, the true thrust of plaintiffs' argument is not that the Board could not lawfully accept a tariff containing Rule 71(A) but rather that it ought not to have done so because the Rule is unreasonable if it covers a case such as this. A claim that a tariff is unreasonable must be passed upon in the first instance by the Board, *United States* v. *Western Pac. R.R.*, 352 U. S. 59 (1956). Although, in *Continental Charters, Inc., Complaint of Mary Battista*, 16 C. A. B. 772 (1953), a court referred such a claim to the Board, which held the notice provision there in question to be unreasonable, such retrospective invalidation of a tariff properly filed with the Board may well be precluded in the light of the Supreme Court's subsequent decision in *T.I.M.E. Inc.* v. *United States*, 359 U. S. 464 (1959).[5] Moreover, nothing has been called to our attention that would give any basis for belief that the Board is dissatisfied with the rule here under attack, and there is much to suggest the contrary. In 1952 the Board dismissed an investigation

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[5] The *T. I. M. E.* case arose under the Motor Carrier Act, on which, as the Board pointed out in *Continental Charters*, 16 C. A. B. at 777, the Civil Aeronautics Act was largely patterned. The Board there relied, 16 C. A. B. at 776-777, on *Bell Potato Chip Co.* v. *Aberdeen Truck Line*, 43 M. C. C. 337, 341-342 (1944), in which the Interstate Commerce Commission had held that despite the absence of reparation provisions in the Motor Carrier Act in contrast to Parts I and III of the Interstate Commerce Act, an absence paralleled in the Civil Aeronautics Act, the Commission could nevertheless make an administrative finding of past unlawfulness of a tariff; *Bell Potato Chip* was later specifically disapproved in *T. I. M. E.*, 359 U. S. at 476-477.

into liability rules insofar as it concerned a provision similar to Rule 71(A), subject only to a condition that "the carriers will give other notice of the $100 limitation on checked and unchecked baggage * * *," Order E-6538, CCH Aviation Law Reports ¶ 21,501; very recently the Board terminated what remained of the investigation, without prejudice, of course, to any future one, Order E-18195 (April 10, 1962). Also the Board has approved an agreement of the international carriers who are members of the International Air Transport Association adopting Conditions of Contract for the passenger ticket that limit to the Warsaw Convention figures liability for baggage on which a higher valuation has not been declared, without any exception for wilful misconduct so far as concerns transportation not subject to the Convention. *Pan American World Airways, Inc., et al., Conditions of Carriage*, 24 C. A. B. 575, 579 (1957). In the light of all this we are not disposed to order, of our own motion, a reference to the Board that plaintiffs have not sought either below or here. All other arguments of plaintiffs are disposed of by our *Lichten* and *Herman* decisions.

Affirmed.

**Judgment**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of April, one thousand nine hundred and sixty-two.

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Present:

HON. CHARLES E. CLARK,
HON. CARROLL C. HINCKS,
HON. HENRY J. FRIENDLY,
*Circuit Judges.*

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JOSEPH VOGELSANG and GEORGE SCHMITTS, co-partners, doing business under the firm name and style of WHITEHOUSE BROS.,

Plaintiffs-Appellants,

v.

DELTA AIR LINES, INC.,

Defendant-Appellant.

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Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

A true copy.

A. DANIEL FUSARO,
Clerk.